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In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL A. SMITH, PETITIONER

v.

WILSON FREIGHT COMPANY AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner, Paul Smith, was employed at the Chelmsford, Massachusetts terminal of Wilson Freight Company (the Company) from May 1967 until his discharge on September 3, 1976 (Pet. App. 42a). During his last four years of employment, he was shop steward for Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) (*ibid.*).

Beginning in 1974 in his capacity as shop steward Smith filed numerous complaints with federal and state officials and agencies regarding working conditions (Pet. App. 4a-10a, 44a-46a). One such complaint involved the settlement of an unfair labor practice charge in which the Company

and the Union agreed that a terminal employee would be reinstated without back pay. In the summer of 1976 Smith contacted the National Labor Relations Board to determine why the charge had not been deemed meritorious, and to protest the settlement. That same summer, it came to the Company's attention that Smith had contacted the Department of Transportation to complain that the Company did not supply snow chains for its trucks during the winter (Pet. App. 10a-11a, 46a-47a). Angered at Smith's involvement in both matters, terminal manager F. X. Rudolph sent a letter to Smith on September 2 informing him that as shop steward his actions were controlled by Article 41 of the New England Supplement and the National Master Freight Agreement,[1] that by filing work-related complaints with government agencies without exhausting the grievance machinery he had violated Article 41, and that the next time he violated the Article he would be discharged (Pet. App. 15a-16a, 42a-43a). The next day, ostensibly as a result of the incident described below, Smith was discharged.

Throughout 1976 there was an ongoing dispute at the Chelmsford terminal regarding the Company's efforts to eliminate bidding by city drivers for routes under 25 miles and posting of starting times for road drivers (Pet. App. 48a). In February and August the Company posted bid sheets reflecting these changes. Smith voided the sheets causing the drivers not to bid on the posted jobs (Pet. App. 11a-12a, 50a). On September 1 Smith voided another bid sheet (Pet. App. 12a, 48a-49a). On September 3 Smith admitted to Rudolph that he had voided the

[1]Article 41 provides that it shall be grounds for discharge for a steward to cause a slowdown or interrupt an employer's business except as authorized by official Union action (Pet. App. 3a n.3).

sheet, but claimed that he had been authorized to do so by the Union (Pet. App. 12a, 49a). Later that morning Union officials told Rudolph that Smith lacked such authority (Pet. App. 13a-14a), and suggested that the drivers bid as requested and that the dispute be resolved by arbitration. That approach proved impractical (Pet. App. 12a, 49a). That afternoon, Rudolph discharged Smith on the ground that he had voided the bid sheet without Union authorization in violation of Article 41 (Pet. App. 12a-13a, 49a-50a). An arbitration panel denied Smith's subsequent grievance challenging the discharge, finding that in voiding the bid sheet he had exceeded his authority as a shop steward. The panel refused to hear any evidence that Smith's discharge might have been motivated by his complaints to government officials and agencies (Pet. App. 16a-17a, 44a, 55a-56a).

2. In response to Smith's subsequent filing of an unfair labor practice charge, the Board found that the Company had discharged Smith because in his capacity as shop steward he had complained to various government agencies regarding working conditions at the Company, and because he had inquired about the Board's processing of a fellow employee's unfair labor practice charge (Pet. App. 51a-55a). The Board also found that in doing so Smith had not exceeded his authority as shop steward because his prior attempts "to press the grievances with [the Union's business agent] were futile" (Pet. App. 54a). The Company's purported reason for discharging Smith—voiding a bid sheet and thereby causing a disruption of operations in violation of Article 41—was found to be pretextual and not a factor motivating the discharge (Pet.

App. 54a-55a).[2] Concluding that the Company had violated Sections 8(a)(1), (3) and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3) and (4), the Board ordered it, *inter alia*, to reinstate Smith with back pay (Pet. App. 58a-60a, 38a).

3. The court of appeals denied enforcement of the Board's order, concluding that Smith had been discharged for violating Article 41 of the collective bargaining agreement and that his complaints to government agencies were not protected activity (Pet. App. 1a-35a). The court agreed with the Board that the arbitration panel's decision was not dispositive of the unfair labor practice charge, but concluded that the panel had established that voiding the bid sheet constituted just cause for discharge under the bargaining agreement (Pet. App. 22a).[3] The Board was free to reject this "objective cause for discharge," said the court, only if it concluded that despite the existence of the legitimate cause Smith would not have been discharged had he not engaged in protected activity (Pet. App. 19a, 22a-23a).

The court then considered Smith's complaints to various government agencies and concluded that, even if the Company had been motivated in part by irritation at Smith's complaint activity, such activity was not protected

[2]The Board refused to defer to the decision of the arbitration panel because the panel had not considered Smith's allegation that his discharge was motivated by Company displeasure at his having filed complaints with the Board and other government agencies (Pet. App. 55a-56a).

[3]The court rejected the Board's conclusion that the Company's failure to discipline Smith for previous incidents of bid voiding showed that its reliance on that infraction was a pretext (Pet. App. 31a-32a).

by Section 7 of the Act (29 U.S.C. 157). The court reasoned that Article 41 of the Agreement required that Smith, while acting as shop steward, first exhaust the grievance procedure set out in the Agreement before filing complaints about working conditions with government agencies, and that the Company could enforce this provision "by confining a steward's formal actions to specified channels" (Pet. App. 26a). The Company's effort to enforce Article 41 was not "conduct destructive of important rights" since the provision fostered a legitimate policy of insuring that stewards represent employees in a manner consistent with the decisions of the bargaining representative (Pet. App. 27a-32a). Consequently, when Smith, acting as shop steward, filed complaints with government agencies without even attempting to exhaust the grievance procedure,[4] he not only violated Article 41 but also engaged in unprotected activity.[5]

[4]The court found the Board's finding that Smith had attempted to exhaust contractual procedures to be unsupported by the evidence (Pet. App. 31a-32a).

[5]The court noted, citing *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), and *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), that individual employees have a protected right to file complaints with government agencies, but concluded that here, "[u]nlike the situation in *Alleluia Cushion* and similar cases, the Company's objection was not simply that an employee had gone to OSHA, DOT or elsewhere, but rather that a union steward was acting in defiance of contract limitations upon his powers" (Pet. App. 25a-26a).

4. In the Board's view, the question raised in the petition—whether a union by contract may lawfully waive the statutory right of an employee who is a shop steward to petition government agencies that protect worker health, safety, and other rights—is not presented here. The court below did not hold that Article 41 of the Agreement deprived Smith of his Section 7 right as an employee to petition OSHA, DOT, or any other government agency respecting safety or other matters affecting his working conditions. The court merely held that Article 41 restricted Smith's right to take such action in his capacity as shop steward, and that the Union, by agreement with the Company, could properly require that when acting as a shop steward, rather than as an individual employee, Smith first exhaust the contract grievance procedure (Pet. App. 26a-29a). The Board did not file its own petition for certiorari in this case because the court's decision, so viewed, rests on a narrow ground[6]

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[6]The Board did not reach this issue—whether Smith's activities would be protected if in derogation of grievance procedures fixed by contract—because it concluded that, in view of the failure of the business agent to act, "Smith was not exceeding his authority as shop steward * * *" (Pet. App. 54a). The court below rejected this finding (note 4, *supra*).

and turns on an interpretation of a particular collective bargaining agreement. However, should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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